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No. 69-5001

In the

Supreme Court of the United States

OCTOBER TERM, 1971

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AND ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT AMICI CURIAE

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BRIEF OF ILLINOIS DIVISION, AMERICAN CIVIL LIBERTIES UNION, AND ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT, AMICI CURIAE

Amici curiae, Illinois Division, American Civil Liberties Union, and Illinois Committee for the Abolition of Capital Punishment, file this brief pursuant to leave heretofore granted by this Court. Amici believe it to be necessary and desirable to supplement what has heretofore been said by them in their motion and brief in support of the petition for a writ of certiorari, granted by this Court on specified grounds. They respectfully refer the Court to their motion and brief, filed in case No. 490 Misc. in the October Term, 1969. As there stated, it is essential that this Court make it abundantly clear that no accused person may be sent to his death or his conviction sustained when the prosecution has withheld substantial evidence favorable to the accused. Here there is sufficient evidence of such suppression to cast substantial doubt on the very guilt of the accused. In addition, the ruling of the Court in the *Witherspoon* case has been improperly thwarted by the Illinois courts. These and other points are fully considered hereinafter.

We would like to acknowledge the assistance of David Cook, a third year law student at the University of Chicago, in the preparation of this brief.

IN THE

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, AND ILLINOIS COMMITTEE FOR THE ABOLITION OF CAPITAL PUNISHMENT AMICI CURIAE

Statement of Facts

In May, 1964, petitioner Lyman A. Moore was found guilty of the murder of bartender Bernie Zitek in Lansing, Illinois, on April 25, 1962. At the trial, the state presented two alleged eyewitnesses, waitress Patricia Hill and customer Henley Powell (whose physical position in the tavern was inconsistent with his being able to identify the killer) (Tr. 522, 530), who identified the defendant as the murderer. (TR. 485-486, 525-526.) A third witness, Virgle Sanders, testified that on April 27, 1962, Moore, known to him as "Slick," admitted having shot a bartender in Lansing, Illinois. (TR. 581, 583-584, 587.) In support

of this testimony, two other witnesses, Robert F. Fair and William Joyce, identified petitioner as present with Virgle Sanders at the time of the admission.[1] (TR. 555, 602.)

At the time of the trial, the State possessed evidence indicating that Virgle Sanders' identification of petitioner Moore as "Slick" was incorrect. This evidence consisted of:

1. A written statement, signed by Virgle Sanders, stating that he had met "Slick" about six months" before the murder date. (PCR. 7, 12.)

   An FBI report on the prison record of petitioner Moore, also in the State's possession, showed that he was incarcerated in the federal penitentiary at Leavenworth, Kansas, from August 23, 1957 until March 4, 1962, and could not have been the man known to Sanders as "Slick" during the time indicated by Sanders' statement. (PCR. 8, 12.)[2]
2. A photograph of one James E. "Slick" Watts, an early and prime suspect for whom the police initially searched.[3]

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[1] Neither witness corroborated the testimony of the admission itself. Witness Fair merely identified defendant as "resembling" the man in question. He further testified to giving that man and another a ride in his car, during which one of the men (not identified) remarked of "trouble with the bartender in Lansing." (TR. 605.)

[2] Lieutenant Turbin of the Lansing Police Department testified that this material was in the police file, of which he had custody during the course of the trial as aid to the prosecuting assistant State's Attorney. (PCR. 5-6.)

[3] Lieutenant Turbin was specifically assigned to locate "Slick" Watts shortly after the police obtained the statement of Virgle Sanders implicating "Slick" in the murder. (PCR. 299-300.) The picture apparently was turned over to the State's Attorney's office along with the rest of the file. (PCR. 251.)

3. A remark by Virgle Sanders, shortly before his trial testimony, that the man he knew as Slick did not wear glasses and was thirty to forty pounds heavier than Moore.[4] (PCR. 130.)
4. The negative identification of a photograph of Lyman A. Moore as "Slick" by William Leon Thompson in early November, 1962.[5]
5. The identity of another man, Delbert Jones, who knew and could identify "Slick."[6]

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[4] This remark was made to an unidentified Lansing police officer. (PCR. 130-131.) It was apparently not communicated to any of the presiding state officials, Lieutenant Turbin, or Mr. Mack or Mr. Fleming, the prosecuting attorneys. Virgle Sanders had not previously viewed the defendant for identification during the two years period between Moore's arrest and trial. (PCR. 129.) Moreover, the accompanying police officer apparently allayed any doubts Sanders might have had by replying, "You know how those jailhouse beans are." (PCR. 131.) Cf. *Foster* v. *California*, 394 U.S. 442.

[5] The substance of Thompson's negative identification was reported orally by Lieutenant Turbin to Mr. Fleming, the assistant State's Attorney in charge of the prosecution of Moore. (PCR. 63.) Thompson never viewed Moore in person. (PCR. 84.) During the course of the investigation, moreover, Thompson was not asked to identify the police department's photograph of James E. "Slick" Watts. Subsequent to trial, when shown photographs of that suspect, Watts, Thompson gave a positive identification. (PCR. 80-83.)

[6] The police never attempted to have Delbert Jones identify Moore, either through photographs or at a lineup. (PCR. 255, 336-337.) After trial, at the request of defense counsel, Jones viewed Moore's picture and Moore personally and said that he was not the man. (PCR. 333, 337.) Jones did give a positive identification of "Slick" Watts as the "Slick" in question when showed a photograph by defense counsel. (PCR. 248-249.)

These items of information and evidence were not disclosed to the defense or to the court.[7] Specifically, the statement of Virgle Sanders was never given to the defense, despite the prosecutor's stipulation prior to trial that he would "guarantee" disclosure of statements given by prosecution witnesses at the close of their direct examination. This representation had been made in response to the defendant's pre-trial motion for the production of witnesses' statements in the possession of the State's Attorney's office or the investigating police departments. (TR. 27-32.) Prior to the testimony of Virgle Sanders, the prosecution had furnished, without specific requests, the statements of the State's witnesses Patricia Hall and Henley Powell, thus complying with its pre-trial agree-

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[7] The opinion of the Supreme Court states that the prosecutor "showed his entire file to the defense attorney • • •." 42 Ill.2d 73, 80. In making this finding, the Court relied upon the declaration of the State's brief on appeal referring to the testimony given at the post-conviction hearing by the assistant State's Attorney, Mr. Fleming. (PCR. 201-202.) Since no reply brief disputing this assertion was filed, that conclusion was understandable. See, *e.g., Thomas* v. *United States,* 343 F.2d 49, 54 (9th Cir. 1965).

The delivery of the file was, however, flatly denied by defense attorney Horka to whom it was assertedly given. (PCR. 230-235.) The trial record supports the testimony of defense counsel that the contents of the file were not disclosed. Prior to trial, the prosecutor expressed opposition to disclosure other than the names of witnesses, and written statements of witnesses to be given at the close of direct testimony. (TR. 31-32, 41.) Early in trial, defense counsel requested certain statements taken by police officer Koppitz the night of the murder. (TR. 464.) The prosecuting attorney futilely objected that these were not among the statements agreed upon before trial and were not admissible. The colloquy which followed makes clear the entire file was not shown. (TR. 465-466)

ment. (TR. 507, 531.)[8] No pre-trial demand for disclosure covered the other items of information possessed by the State.

Other relevant facts are set forth in the argument hereinafter.

Summary of Argument

The constitutional prohibition on the knowing use of false evidence in a criminal trial is not limited to the deliberate use of technical perjury. It applies to any demonstrably erroneous evidence which may have had an effect upon the outcome of the trial. This rule is not limited to prosecutorial misconduct by investigative officials and the prosecutor's staff. Proof of both falsity and the knowledge of falsity may be made by circumstantial evidence, and it is the duty of this Court to review

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[8] It is clear that the prosecutor had not revealed his entire file. The only other reference to the prosecutor's file contained in the trial transcript is the comment of the prosecutor at the closing argument. (TR. 951.)

At the post-conviction hearing, Lieutenant Turbin who acted as the prosecutor's police assistant during trial, testified only that "in the court of law, anyone where they asked for a statement was given to the defense counsel in my presence. Anything that was in our file was given." (PCR. 51.) The judge at the post-conviction proceeding who had also presided at trial, made no ruling upon the contention that the file had been delivered to the defense. With regard to suppression, that judge simply indicated that, at trial, no specific requests were made and that, had they been made, they would have been granted.

Since the finding of fact by the Supreme Court was based not upon a ruling by the judge below assessing the credibility of the witnesses, but upon the transcript of proceedings, it is not binding upon this court as a factual determination. Moreover, in the circumstances, that finding appears to lack substantial support in the trial record and should, therefore, be disregarded.

that evidence independently. Proof of the falsity of the evidence may depend in part on evidence obtained after trial as well as that possessed at the time of trial. A conclusion that the State knowingly presented such evidence should be made when the State officials possessed evidence incompatible with the factual accuracy of the testimony given at trial. In such circumstances they should not be excused when the suspect testimony proves to have been false.

Even if the evidence fails to support the knowing use of false testimony in this case, the prosecution's failure to disclose the evidence violated due process. The evidence was favorable to the defense in casting serious doubt upon the accuracy of an important identification and in inculpating another suspect. This evidence would have been extremely useful to the defense as well as to the jury at trial. Under *Brady* v. *Maryland*, 373 U.S. 83, the prosecutor's failure to show the defense a prior extrajudicial statement which he had requested prior to trial placed upon the prosecutor the risk that the evidence contained in that statement could be used favorably by the defense. No request for additional items of evidence, including a non-recorded statement or photograph of another suspect, should be required when such evidence could not reasonably be anticipated by the defense. Due process required the disclosure of this evidence.

The trial in this case also violated basic notions of fairness because the prosecution was permitted to introduce evidence relevant, if at all, only to the punishment of the accused and which was highly prejudicial to the determination of guilt. This inherent prejudice was compounded when the prosecution permitted both the trial and appellate courts of the State to rely upon the clearly erroneous

possibility that the 16-gauge shotgun could have been the murder weapon. In a capital case, the defense should not be permitted to employ evidence totally irrelevant to proof of guilt to influence the jury. The only evidence which the constitution can permit is that which is reasonably competent to prove guilt. A state court, no less than the prosecution, cannot justify such action on the clearly erroneous ground that the weapon introduced "might have been" the murder weapon.

Finally, even if those actions do not require a new trial, petitioner's death sentence must be set aside for violating the clear ruling of this Court in *Witherspoon* v. *Illinois*, 391 U.S. 510.

I

PETITIONER WAS DEPRIVED OF DUE PROCESS WHERE

A. His Conviction Was Obtained Through An Identification Which State Officials Knew To Be Erroneous; and

B. The State Withheld Evidence Vital To An Effective Defense.

PETITIONER WAS DENIED DUE PROCESS WHERE THE STATE USED AN IDENTIFICATION WHICH IT KNEW WAS ERRONEOUS.

For over thirty years, this Court has recognized the principle that the Due Process Clause of the Fourteenth Amendment will not sanction a conviction obtained through the use of evidence known to be false.

> *Miller* v. *Pate*, 386 U.S. 1; *Napue* v. *Illinois*, 360 U.S. 264; *Alcorta* v. *Texas*, 355 U.S. 28; *Pyle* v. *Kansas*; 317 U.S. 213; *Mooney* v. *Holohan*, 294 U.S. 103.

This constitutional prohibition should apply whether the false factual assertion is the product of the witness' erroneous perception or a deliberate lie. Cf. *Miller* v. *Pate*, 386 U.S. 1; *Alcorta* v. *Texas*, 355 U.S. 28. Inquiry into the subjective state of witness' mind to determine his actual knowledge or belief merely adds a ponderous factual element which is tangential to due process considerations. The fundamental concern must lie with the objective accuracy of the evidence presented to the fact finder. The good or bad faith of the witness in making a factual assertion has no effect upon the accuracy or inaccuracy of the evidence given. Each may lead to an unjust conviction.

A mistaken identification which is knowingly offered as "truth" impairs the integrity of the system of justice.[1]

Proof of "knowledge" of falsity on the part of the prosecution is, of necessity, a speculative endeavor. Only in the most unusual case where the official charged admits his direct involvement, can subjective "knowledge" of the evidence's falsity be found with any certainty.[2] For the prohibition to be an effective remedy of unjust convictions and a prophylactic against governmental foul play, it should not depend upon the virtual admission of the official's knowledge of certain falsity.[3] Where the prosecution possesses evidence which, if true, clearly refutes the accuracy of material testimony, the test of "knowledge" should be deemed satisfied. A prosecution possessed of such information, which permits testimonial assertions of fact to stand unclarified or uncorrected, improperly substitutes its own conclusions on the truth and accuracy of the facts for those of the jury. Use of such testimony in those circumstances effectively misrepresents the facts of the case to an extent as great as that gound violative of due process in *Alcorta* v. *Texas,* 355 U.S. 28, or *Miller* v. *Pate,* 386 U.S. 1.

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[1] See *Hamric* v. *Bailey,* 386 F.2d 390, 394 (4th Cir. 1967); cf. *United States* v. *Kaplan,* 101 F.Supp. 7 (S.D. N.Y. 1951); see generally Carlson, "False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?" 1969 Duke L.J. 1171, 1186, note 42. But cf. *Johnson* v. *Bennett,* 386 F.2d 677, 680 (8th Cir. 1967), vacated and remanded on other grounds, 393 U.S. 253, reversed on other grounds, 414 F.2d 50 (8th Cir. 1969).

[2] *E.g., Napue* v. *Illinois,* 360 U.S. 264; *Alcorta* v. *Texas,* 355 U.S. 28; cf. *Miller* v. *Pate,* 386 U.S. 1.

[3] See *United States ex rel. Montgomery* v. *Ragen,* 86 F.Supp. 382, 390 (N.D. Ill. 1949).

Such a test for prosecutorial knowledge does not impose undue burdens upon the prosecution. Due diligence in the investigation and preparation of a case will bring these facts to light. Ordinary intelligence is all which is necessary to ascertain their weight. A fair and impartial concern for justice, rather than a myopic quest for conviction, should lead the State to recognize that presentation of such witness' testimony creates a significant threat to the accuracy of the factual determination upon which guilt or innocence rests. Where ample notice of a real risk of false evidence exists, the prosecution should not be permitted to avoid the conclusion of "knowledge" of the falsity of that evidence.

Moreover, inquiry into the prosecution's knowledge of the falsity of its evidence must not cease with the actual knowledge of the prosecutor. In *Pyle* v. *Kansas*, 317 U.S. 213, this Court held that the due process clause would be violated where the wrong was done by "local authorities" and "State Police," even though the prosecuting attorney at trial was ignorant of the perjured character of the evidence presented at trial. Cf. *Hysler* v. *Florida*, 315 U.S. 411, 413. As Judge Soboloff has observed:

> The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the

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See, *e.g.*, *United States* v. *Bailey*, 439 F.2d 642, 650 (D.C. Cir. 1971); *Curran* v. *Delaware*, 259 F.2d 707, 712-713 (3d Cir. 1958); *United States* v. *Consolidated Laundries*, 291 F.2d 563, 570 (2d Cir. 1961); *Smith* v. *Florida*, 410 F.2d 1349 (5th Cir. 1969); *Imbler* v. *Craven*, 298 F.Supp. 795 (C.D. Cal. 1969), *affirmed*, 424 F.2d 631 (9th Cir. 1970), *certiorari denied*, 400 U.S. 865; *Nash* v. *Purdy*, 283 F.Supp. 837, 841 (D.C. Fla. 1968); *Evans* v. *Kropp*, 254 F.Supp. 218, 222 (D.C. Mich. 1966); *Maryland* v. *Giles*, 239 Md. 458, 212 F.2d 101 (196); *Hale* v. *Indiana*, 248 Ind. 630, 230 N.E.2d 432 (1967); *Arizona* v. *Fowler*, 101 Ariz. 561, 422 F.2d 125 (1967).

> State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant.

Barbee v. *Warden, Maryland Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964).

The ultimate determination of the falsity of the evidence and the State's knowledge of that fact rests with this Court. In *Napue* v. *Illinois*, 360 U.S. 264, 271-272, this Court observed that:

> [t]he duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Cooper* v. *Aaron*, 358 U.S. 1.[5]

Any determination of the truth or falsity of testimonial evidence involves the balanced conclusion of probabilities. In this case, the evidence renders it "most probable" that Virgle Sanders' trial identification of Moore as "Slick" was factually erroneous. *Had the jury known that Moore was in prison when "Slick" was previously seen by Sanders, the jury might well have concluded, as indeed it should have, that Sanders was wrong. Moore might well have been acquitted, as, again, he should have been in the circumstances.*

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[5] See also, e.g., *Lyons* v. *Oklahoma*, 322 U.S. 596, 602-603; *Gallegos* v. *Nebraska*, 342 U.S. 55, 60-61; *Brooks* v. *Florida*, 389 U.S. 413, 415. Cf., *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285; *Greenbelt Cooperative Publishing Co.* v. *Bresler*, 398 U.S. 6; *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265.

Inquiry into the falsity of the witness' testimony is not confined to facts established at or prior to trial. See, *e.g.*, *Miller* v. *Pate*, 386 U.S. 1, 5; cf. *Blackburn* v. *Alabama*, 361 U.S. 199, 211.

Sanders' initial, written statement to police ascribed his first meeting with "Slick" to a time well before Moore was released from federal prison. His testimony at the post-trial hearing generally confirmed the "fact" that Sanders met "Slick" *approximately six months before the murder, and four months before Lyman Moore's release from Leavenworth.*

At the end of his cross-examination, Sanders admitted his error:

> Q. And did you tell me and also later on, did you tell the policeman from the State's Attorney's Office that if you had known that this fellow, Lyman Moore, was in the Federal Penitentiary until March 4, 1962, you would definitely not have identified him as being Slick that you knew?
>
> A. If he's in jail, it would have been impossible to be the same man.

(PCR 133.)

The factual impossibility of a correct identification of Moore as "Slick" suggested by that inconsistency is corroborated by Sanders' acknowledgment of physical discrepancies in weight.

Sanders was also unable to reach any definitive conclusion with respect to James E. "Slick" Watts:

> Q. I am now going to show you a picture, which has been admitted here as Petitioner's Exhibit 7, and I ask you if that is a picture of Slick. Tell the Judge to the best of your ability, is that Slick?
>
> A. I'm going to tell you the truth, Your Honor. I just honestly don't know. The guy I knew had a

brush haircut, but it was long, and this guy isn't. It's more of a round face.

Q. You don't know for sure if this is him, and you can't say it isn't, can you."

A. That's right.

Q. You can't say either way?

A. That's right.

(PCR 134.)

Additional refutation of the identification exists in the form of the negative identifications supplied by William Leon Thompson and Delbert Jones, the other acquaintances of "Slick." The record of the post-conviction hearing further reveals that both William Leon Thompson and Delbert Jones identified James L. Watts as the same "Slick" who frequented the bars in that area during the fall of 1961. (P.C.R. 76-77, 83-84, 246, 255.) Added to the evidence supplied by Sanders himself, this testimony clearly establishes that Sanders' identification of Moore as "Slick" was erroneous.

The record also discloses that, at the time of Moore's trial, the State officials present at that proceeding possessed evidence from which they must have inferred that Sanders' testimony was false.

The uncontradicted testimony at the post-conviction hearing indicates that the State's prosecutor possessed and was well aware of Virgle Sanders' statement. Mr. Fleming testified that he read Sanders' statement to him during the course of pretrial preparation. (PCR 201.) In addition, the prosecutor's file contained the FBI report on the defendant's record. (PCR 6.) The record also established through the uncontradicted testimony of Lieutenant Turbin that the prosecutor had been informed that William Leon Thompson had been unable to identify Moore as "Slick," although he was acquainted with "Slick." (PCR 63.)

Lieutenant Turbin of the Lansing, Illinois, Police Department was present at the trial itself as a member of the prosecutor's staff. Acting as the advisory investigating police officer, it was his responsibility to counsel the prosecutor on factual matters, including calling to the prosecutor's attention pertinent factual omissions. (See PCR 198-199.) He handed the assistant State's Attorney relevant documents from the prosecution's file. (PCR 199-200.) He admitted that he was familiar with the contents of that file, including the items at issue on this appeal. (PCR 5ff.)

Turbin was instrumental in the investigation of the murder of Bernie Zitek from its inception. He was initially assigned to locate the original suspect, James E. "Slick" Watts. After that investigation focused on petitioner Moore, he assisted in the preparation of the prosecution's case. During the preparation of that case, he attempted to obtain evidence substantiating the potential identification of Moore as "Slick" by Sanders and was aware that Thompson had been unable to corroborate that identification. Turbin was also present when Sanders remarked on the weight discrepancy. (PCR 130.) By uncontradicted testimony, he was also present at the trial.

The pivotal question in determining the "knowledge" of the prosecution in this case is whether any state official can be inferred to have known, or held to knowledge of, the fact that Virgle Sanders' statement to police indicated that he met "Slick" at a time when Moore was imprisoned. If knowledge of that "fact" can be ascribed to the State, the combination of that element with other information known to the prosecution should be held sufficient knowledge of falsity to constitute a denial of due process.

Knowledge, whether actual or presumed as a matter of law, in this case requires the combination of the knowledge

of the criminal record of Moore with the facts contained in Moore's statement. Both the prosecutor, and certainly Lieutenant Turbin, may be presumed to have known Moore's prior confinement by virtue of their possession of the FBI record. Especially with respect to Lieutenant Turbin, this presumption is fortified by the inferences attendant upon long and intimate association with the investigation, both prior to and after Moore's arrest. During virtually the entire investigation of Moore, the Lansing Police possessed that record. The importance of Sanders' testimony and his identification of Moore as "Slick" led the prosecution to seek additional corroboration from Thompson. Only by willfully disregarding the material in its own file could the State have failed to be aware of the fact that Moore had been in prison at the time Sanders claimed to have met "Slick."

As Judge Ferguson stated in *Imbler* v. *Craven,* 298 F.Supp. 795, 807-811 (C.D. Cal. 1969), affirmed 424 F.2d 631 (9th Cir. 1970), certiorari denied, 400 U.S. 965:

> "While the prosecutor claimed not to have disbelieved these outright lies, he clearly had cause to suspect them. The reckless use of highly suspicious false testimony is no less damaging or culpable than the knowing use of false testimony, and a conviction based upon such evidence must suffer the same consequence.
>
> * * *
>
> "* * * The prosecutor either had reason to believe or in fact knew that each item of evidence * * * was untrue. The state cannot now disclaim knowledge of such falsity on the ground that its agent, the prosecutor, ignored the facts before him or that the investigating officers failed to disclose those facts to him. Due process of law does not tolerate a prosecutor's selective inattention to such significant facts. It requires that he exercise good faith in prosecuting that

case. Such good faith is not fulfilled where the prosecutor allows his witness to give false testimony of which he has advance knowledge and the accuracy of which he has reason to suspect. The duty of good faith is not merely a negative one, to omit from one's case outright lies. It imposes as well an affirmative duty to avoid even unintentional deception and misrepresentation, and in fulfilling that duty the prosecutor must undertake careful study of his case and exercise diligence in its preparation, particularly where he is confronted with facts tending to cast doubt upon his witness' testimony. The prosecutor's objective is justice; his role is not that of a mere advocate."[9]

B. The State's Failure to Disclose Favorable Evidence to the Defense Violated Due Process

1) The Prosecution Withheld the Requested Extrajudicial Statement of Virgle Sanders in Violation of Due Process of Law.

In *Brady* v. *Maryland*, 373 U.S. 83, the majority of this Court reviewed its earlier decisions touching on suppression of evidence and declared approval for the rule that

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[9] See also *Wild* v. *Oklahoma*, 187 F.2d 409, 410 (10th Cir. 1951) (dictum indicating that the Constitution is violated by use of evidence which is false and which the state "had reason to believe was false or perjured."); *McMullen* v. *Maxwell*, 3 Ohio St. 2d 160, 168, 209 N.E. 2d 449, 455 (1965) (holding that where "the prosecutor knows or has good reason to believe that the testimony is false, he must either disclose the falsity of the testimony or make available to the defense the means to do so.")

It has been persuasively argued that the requirement that state investigatory or prosecutorial officials know of the falsity of the evidence at the time of trial should be dispensed with. Carlson, *False or Suppressed Evidence: Why the need for the Prosecutorial Tie?*, 1969 Duke Law. J. 1171, 1185-1186. See also, *Darley* v. *Mayo*, 351 U.S. 277, 285 (dissenting opinion).

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 393 U.S. at p. 87.

In *Brady,* the defense had made a pre-trial request for the extrajudicial statements of an accomplice. Two signed statements were produced, but a third unsigned statement was withheld, assertedly on the ground that it was not admissible.

The facts in the instant case are not materially distinguishable. Here, the statement of Virgle Sanders was never given to the defense, despite the prosecutor's stipulation prior to trial that he would "guarantee" disclosure of statements given by prosecution witnesses at the close of their direct examination. This representation had been made in response to the defendant's pre-trial motion for the production of witnesses' statements in the possession of the State's Attorney's office or the investigating police departments. (TR. 27-32.)[10] Prior to the testimony of Virgle Sanders, the prosecution had furnished, without specific requests, the statements of the State's witnesses Patricia Hall and Henley Powell, thus complying with its pre-trial agreement. (TR. 507, 531.)

In these circumstances, the failure of the defense to repeat its request during the trial itself with specific reference to Virgle Sanders' statement should not excuse

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[10] The defendant also filed other broad demands for the production of evidence in the prosecutor's possession, including "Police station complaint book, to and from reports, lock-up keeper records, and all other reports and documents in connection with the above indictment." These requests were denied. (Common Law Record 54-56).

the suppression of that statement. The purpose of a request is to alert the prosecution of the pertinence and need of the information for the defense. *United States* v. *Keogh,* 371 F.2d 138, 147 (2d Cir. 1968).

Assuming that the prosecution was justified in withholding the extrajudicial statements until the trial itself, it can make no contention that it lacked notice in this case. The prosecutor had already supplied the statements taken from the preceding identifying witness without any additional demand. His failure to supply Sanders' statement might well have been construed by defense counsel to indicate that there was in fact no statement in the State's possession.[11] The State should not be excused for failing to comply with its admitted duty because the defense did not specifically remind it of that fact at every corner. The risk of error in failing to disclose the statement must be placed on the shoulders of the prosecution.

The Statement of Virgle Sanders contained evidence favorable to the accused and was material to the determination of his guilt. No distinction should be drawn between the prejudice required to set aside a conviction where the State has improperly withheld evidence on demand and other improper government handling of evidence. The absence of this evidence "may have had an effect on the outcome of the trial." *Napue* v. *Illinois,* 360 U.S. 264, 272. It tended to discredit the identification of Moore by Sanders, and the jury "might well have" accepted Moore's alibi defense. *Alcorta* v. *Texas,* 355 U.S. 28, 33.

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[11] Compare *United States ex rel. Thompson* v. *Dye,* 221 F.2d 763 (3 Cir. 1955), certiorari denied, 350 U.S. 875; *Jackson* v. *Wainwright,* 390 F.2d 288, 298 (5th Cir. 1968).

2) The Absence of a Request Did Not Justify the State's Failure to Disclose Evidence Significantly Favorable and Useful to the Determination of Guilt.

Defense counsel's failure to request disclosure of the remaining items of evidence in this case should not foreclose the conclusion that the suppression of that evidence rendered the trial unjust. Considerations of fundamental fairness to the accused particularly in a capital case, as well as practical realities bearing upon a request for disclosure of evidence, militate against making such a request the *sine qua non* of a constitutional rule.

The disclosure of evidence should not hinge exclusively upon the ability of the defense counsel to anticipate or surmise the wide range of possible favorable evidence which the State's investigation may have uncovered. Where the circumstances of the case make it unlikely that the defense could anticipate or guess and request disclosure of the evidence in question, it would add to the unfairness of the trial to penalize the defense for its failure to make a request. In such circumstances, speculation over whether the defense might have ascertained the evidence or the possibility of evidence should not outweigh the fundamental concern for a fair trial.[12] Automatically to excuse officials from an obligation imposed upon them by reason of their

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[12] See, *e.g., Levin* v. *Katzenbach,* 363 F.2d 287, 291 (D.C. Cir 1966); *United States ex rel. Meers* v. *Wilkins,* 326 F.2d 135, 140 (2d Cir. 1964); *Barbee* v. *Warden, Maryland Penitentiary,* 331 F.2d 842, 845-846 (4th Cir. 1964); *Arizona* v. *Fowler,* 101 Ariz. 561, 422 P.2d 125 (1967); cf., *e.g., United States* v. *Soblen,* 301 F.2d 236, cert. denied, 370 U.S. 944 (2d Cir. 1962); *Webb* v. *Beto,* 362 F.2d 105 (5th Cir. 1966), *cert. denied,* 385 U.S. 940, *rehearing denied* (5th Cir. 1966), *cert. denied,* 385 U.S. 940, *rehearing denied,* 386 U.S. 930.

superior knowledge in such circumstances is inconsistent with the very rationale which creates that duty. Such a requirement would place an unfair burden upon the defendant which is not commensurate with the relative abilities to obtain evidence of the state and the accused. Even where a request might lend assistance to the prosecutor in ascertaining or insuring the disclosure of favorable evidence, the very ignorance of the accused would render it impossible for the defense to know what to request in order to remedy its ignorance. This is especially true in light of the narrow scope of pre-trial discovery. A request may thus become a substitute for discovery, or a game of wits played by opposing counsel.

A request should also be unessential where it would have been futile. Thus, where the evidence has been withheld from the prosecutor himself, a request for its disclosure would in all likelihood be unavailing.[13] Similarly, where the State itself has not obtained the evidence until late in the proceedings, the failure of the defense to request the item in question should not preclude itself. So, also, events which occur during the prosecutor's preparation or at the trial may serve the purpose of the request by flagging the evidence for the prosecution.[14]

Absent a request, due process considerations nevertheless require a State to disclose evidence which, in the cir-

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[13] *E.g., Barbee* v. *Warden, Maryland Penitentiary;* 331 F.2d 842, 846 (4th Cir. 1964); see also *Clements* v. *Coiner,* 299 F. Supp. 752, 758 (S.D.W.Va. 1969).

[14] *E.g., United States* v. *Miller,* 411 F.2d 825, 831, 832 2d Cir. 1969).

cumstances of the case, is highly favorable and useful to the defense on material issues of guilt.[15]

The goal of the criminal process, culminating in an adversary trial, is the determination of factual truth: The concern for the accuracy of the ultimate factual determinations upon which a conviction rests lies at the heart of the notion of fundamental fairness embodied in the Due Process Clause of the Constitution.[16] The Constitution guarantees the defendant determination of these issues by an impartial and informed tribunal, judge or jury. *In re Murchison*, 349 U.S. 133, 136; *Turner* v. *Louisiana*, 379 U.S. 466, 471-473. Where state officials, prosecutorial or investigative, withhold material evidence favorable to the

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[15] *E.g.*, *Levin* v. *Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966); *United States ex rel. Meers* v. *Wilkins*, 326 F. 2d 135 (2d Cir. 1964); *Barbee* v. *Warden, Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964); *Jackson* v. *Wainwright*, 390 F.2d 288 (5th Cir. 1968); *Clarke* v. *Burke*, 440 F.2d 853 (7th Cir. 1971); *Thomas* v. *United States*, 343 F.2d 49 (9th Cir. 1965); *Arizona* v. *Fowler*, 101 Ariz. 561, 442 P.2d 125 (1967); *Smith* v. *Urban*, 245 Ark. 781, 434 S.W.2d 283 (1968); *Hale* v. *Indiana*, 248 Ind. 630, 230 N.E.2d 432 (1967); *Wisconsin* v. *Cathey*, 32 Wis.2d 79, 145 N.E.2d 100 (1966); *Link* v. *United States*, 352 F.2d 207, 212 (8th Cir. 1965), *cert. denied*, 383 U.S. 915.

[16] See, *e.g.*, *Foster* v. *California*, 394 U.S. 440, 442; *Chandler* v. *Fretag*, 348 U.S. 3; cf. *Simmons* v. *United States*, 390 U.S. 377, 383; *Ungar v. Sarafite*, 376 U.S. 575. Many of the guarantees set forth in the Bill of Rights and made recently obligatory upon states through the Fourteenth Amendment's Due Process Clause reflect this principle. See, *e.g.*, *Duncan* v. *Louisiana*, 391 U.S. 145; *Washington v. Texas*, 388 U.S. 14; *Klopfer* v. *North Carolina*, 386 U.S. 213; *Pointer* v. *Texas*, 380 U.S. 400; *Gideon* v. *Wainwright*, 372 U.S. 335.

defense, they assume a role of fact-finder which the Constitution reserves for others. Their action directly threatens and impairs the accuracy of the determinations to be made. The concealment of such evidence, whether involving active misrepresentation or passive non-disclosure of exculpatory evidence, places the prosecution "in the role of an architect of a proceeding that does not comport with standards of justice." *Brady* v. *Maryland*, 373 U.S. 73, 88.

The position of State prosecuting and investigative officials imposes upon them a duty, not simply to convict, but to see that justice is done. Cf. *Mesarosh* v. *United States*, 352 U.S. 1, 14; *Berger* v. *United States*, 295 U.S. 77, 78.[17] They cannot rely upon the defendant to obtain and produce at trial the full range of evidence contradicting proof of guilt. As Judge Palmieri observed in *Application of Kapatos*, 208 F. Supp. 883, 888 (S.D.N.Y.):

> The purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one. The average accused usually does not have the manpower or resources available to the state in its investigation of the crime. Nor does he have access to all of the evidence, much of which has usually been removed or obliterated by the time he learns that he is to be tried for the crime. In view of this disparity between the investigating powers of the state and the defendant, I do not think it imposes too onerous a burden on the state to require it to disclose the

[17] See Canon 5 of the American Bar Association Canons of Professional Ethics: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing innocence of the accused is highly reprehensible." See also *Jackson* v. *Wainwright*, 390 F.2d 288, 294-295 (5th Cir. 1968).

existence of a witness of the significance of Danise in the instant case.[18]

The duty of the State to disclose evidence favorable and essential to the defense acknowledges that imbalance. Its impact upon the defense is paramount where, as here, the alleged crime is a capital offense. See *Curran* v. *Delaware*, 259 F.2d 707, 711 (3d Cir. 1958):

> The focus must be on the character of the evidence and its potential impact on the factual conclusions of the trial. This focus is of particular pertinence where the evidence in question contradicts or casts doubt upon the truth of evidence presented by the prosecution. In such instances, the duty of disclosure is reinforced by the prosecutor's responsibility for the truth of the evidence which he presents. Even though the State may lack certain proof that testimony is false, it should be obliged to disclose evidence which substantially undermines or refutes the evidence which it submits.

In light of these considerations, the failure of the defense to request disclosure of the evidence in this case should not be dispositive of his constitutional claim. The refusal of the prosecutor to supply Sanders' extrajudicial statement prior to trial effectively foreclosed the defense's ability to ascertain the pertinence of "Slick" to the case or the existence of "Slick" Watts as a suspect. Although a list of potential witnesses were supplied, there is nothing to suggest that defense counsel should have been expected to ascertain from those witnesses any of the evidence at issue here. There is no suggestion that defense counsel,

[18] See also Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1192 n. 1; Note *The Prosecutor's Constitutional Duty to Real Evidence to the Defendant*, 74 Yale L.J. 136, 142-143 (1964).

in these circumstances, could reasonably have been expected to request disclosure of the negative identification given by William Leon Thompson.

Similarly, the failure of the defense to request disclosure of the oral statement of Virgle Sanders at the trial should not be dispositive. Such a request would, in all likelihood, have been futile. Moreover it occurred at such a late stage in the proceeding that it would be unfair to expect the defense to investigate such an occurrence.

a. The Requirement of Disclosure of Favorable and Useful Evidence Applies to All State Officials Connected With the Prosecution

It should also be irrelevant that some or all of the favorable evidence was not possessed by the prosecutor as such. The requirements of due process apply to all State officials. The suppression of evidence by the State's investigative officials or prosecutorial staff prejudices the defendant's ability to obtain an accurate determination of the facts of his case to the same degree as suppression by the prosecutor himself.

Thus, in *Pyle* v. *Kansas*, 317 U.S. 213, this Court held that due process was violated where such officials knowingly used prejudicial testimony and deliberately suppressed evidence favorable to the accused. Where the State official is involved in the investigation of a crime or the preparation of the case, he is a part of the "prosecution," and favorable evidence which is in his possession rather than the prosecuting attorneys should be relevant to a determination of the fairness of the trial.[19]

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[19] *Barbee* v. *Warden*, 331 F.2d 842, 846-847 (4th Cir. 1964); *Bryant* v. *United States*, 439 F.2d 642, 650-651 (D.C. Cir. 1971); *Imbler* v. *Craven*, 298 F. Supp. 795 (C.D. Cal. 1969), *affirmed*, 424 F.2d 631 (9th Cir. 1970),

The function of investigative officials is to discover the facts. Clearly, their duty is not to convict but to ascertain the true facts. To an even greater extent than the prosecutor, their position during an investigation thus requires impartiality and candor. The very ability of the prosecutor to function properly depends upon the full disclosure by the State's investigators not only of evidence which inculpates an accused, but of evidence which is inconsistent with guilt and which derogates from proof of guilt. Lacking such information he cannot make a truly informed decision to prosecute. Nor can the prosecutor effectively direct the final preparation and presentation of the State's case.

Implementation of the prosecutor's duty to disclose evidence which is materially favorable to an accused strengthens the need for disclosure by the police. The rationale upon which that duty rests is the superiority of the State, through its investigative forces to acquire knowledge. More than merely adventitious disclosure of such evidence by those officials to the prosecutor himself should be required. Knowledge of the "prosecution" must accordingly include the knowledge of favorable evidence possessed by all State officers involved in investigating and prosecuting the case.

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[19] (Continued)
cert. denied, 400 U.S. 865; *Evans* v. *Kropp,* 254 F. Supp. 218 (D.C. Mich. 1966); *Walker* v. *Bishop,* 295 F. Supp. 767 (D.C. Mich. 1967), *affirmed,* 408 F.2d 1378 (8th Cir.); *Hale* v. *Indiana,* 248 Ind. 630, 230 N.E.2d 432 (1967); *Giles* v. *Maryland,* 239 Md. 458, 212 A.2d 101 (1965), *vacated on other grounds,* 386 U.S. 66; *Cheatwood* v. *Colorado,* 435 P.2d 402 (1968). See also *Smith* v. *Florida,* 410 F.2d 1349, 1350-1351 (5th Cir. 1969).

This case presents especially strong grounds for such a conclusion. All the items of evidence in question were known to the same police official, Lieutenant Turbin. He was involved in the investigation and prosecution of this case from shortly after the murder to the culmination of the trial. He was present at the trial itself, acting as the advisory assistant to the prosecution. Even when courts have drawn a distinction between the police and prosecutorial duties of disclosure, they have recognized that a state official acting in such a capacity may be bound by the duty to disclose exculpatory evidence.[20] He is as much a prosecuting officer as the state's attorney himself. He is capable of assessing the value of evidence and its probative implications. He is able to appreciate evidence which contradicts or is inconsistent with the truth of a witness' declarations or proof of guilt. No distinction should be drawn between the prosecutor and such an assistant in terms of the State's responsibility to disclose favorable evidence on material issues.

b. Disclosure Must be Made of Unrecorded as Well as Recorded Evidence.

The fact that certain of the evidence claimed to be favorable to the defense was not recorded should not affect the requirements of disclosure.

The form in which favorable evidence possessed by the prosecution exists should not detract from its duty to disclose that evidence.

The thrust of the prohibition is toward disclosure of the evidentiary facts which cast light on the guilt or in-

[20] See *Bowles* v. *Texas*, 366 F.2d 734, 738 (5th Cir. 1966); *Luna* v. *Beto*, 395 F.2d 35, 41 (5th Cir. 1968) (*en banc*), (concurring opinion), *cert. denied*, 394 U.S. 966.

nocence of the accused. The government is no less informed or possessed of the facts comprising evidence favorable to the defense where that evidence is unrecorded than when it has been transcribed. In every practical sense, evidence is no less evidence because it is not in documentary form. Where the state possesses the factual evidence of potential testimony, its failure to record that or place it in a form which would itself be admissible as formed "evidence" should have no effect on the constitutional issues raised by its failure to disclose that evidence. Such a distinction would elevate form over substance and would encourage, rather than discourage, both governmental evasion and poor prosecutorial and investigatory practices.

By the same token, the relevance of a request should not automatically vanish where the evidence has not been recorded. The same value attaches to a request in both circumstances, and the same considerations may attend a defendant's failure to request. Where, however, the defense may have been misled into believing that the state's favorable evidence had been revealed by disclosure of recorded evidence, the failure of the defense to request that evidence should not be considered. Thus, where a prosecutor reveals all or a substantial portion of the state's files, a defendant may incorrectly infer that all favorable evidence has been recorded. Even if unintentional, such action should relieve the defense of any responsibility for further requests.

c. The Evidence was Favorable to the Defense and of Substantial Relevance to Material Issues of Guilt.

In the context of this case, the evidence withheld by the State, considered separately and as a group, was favorable

to the accused on material issues of guilt. It held substantial importance to the defense and to the jury's ability to make an informed and accurate assessment of the facts.

This evidence consisted of the extrajudicial statements of Virgle Sanders, both written and oral, the unrecorded negative identification of Moore as "Slick" by William Leon Thompson, and the identity and photograph of the suspect, James E. "Slick" Watts.[21]

The testimony of Virgle Sanders constituted a significant link in the prosecution's case. If believed, it established Moore as having virtually admitted the crime charged to an acquaintance only a few days after the murder took place. At the heart of that testimony lay the identification of Moore as "Slick." In the context of this case, therefore, the identification of Moore by Sanders, virtually unchallenged at trial, carried nearly the same significance as the other eyewitness identification supplied by Patricia Hall and Henley Powell. The undisclosed evidence tended to destroy Sanders' identification of Moore and to suggest a defense unexplored at trial.

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[21] Clearly the written extrajudicial statement of Virgle Sanders and the photograph of Watts were admissible documents. The other, unrecorded hearsay evidence could, however, have been admitted, either as *res gestae* in the case of Thompson's identification or as a part of cross examination of Sanders. Whether or not admissible in the form considered, this constituted testimonial evidence.

The contrary is the case for the identity of the potential identifying witness, Delbert Jones. The identity of the witness is not the same as his potential testimony. As information it would certainly have proved a useful and fruitful source of evidence. The failure to obtain potentially favorable evidence should not be equated with the failure to disclose that evidence. See *Peoples* v. *Hocker*, 428 F.2d 960, 964 (9th Cir. 1970).

At a minimum, the evidence at issue undercut the apparent certainty with which Sanders identified Moore.[22] The extrajudicial statements of Sanders strongly suggested that Moore could not possibly have been "Slick," the man Sanders originally described as relating the admission. The negative identification by William Thompson of Moore as "Slick," even if simply the failure of the witness to make an identification, also contradicted Sanders' testimony in the context of this case.[23] Finally, as Sanders' testimony of the post-conviction hearing indicates, the photograph of "Slick" Watts provided a further source for undermining that identification.

The combination of these items, particularly Sanders' April 30, 1962, statement to police and the photograph of James E. "Slick" Watts, would have provided another possible defense by inculpating one other than the accused. It is impossible to ascertain on this record the possible consequences upon the outcome of the case which might have flown from the defense's possession of Watts' pic-

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[22] This applies as well to the corroborative identification by witness Joyce who substantiated Sanders' testimony to the point of identifying Moore as being in the Ponderosa Tap on April 27, 1962. Robert T. Fair merely indicated that the defendant "looks like one of the men" in the bar. (TR. 602.) The testimony of the trio regarding the identification of Moore may well have been altered significantly had Virgle Sanders' identification been refuted or impeached.

[23] Even the absence of a positive identification was significant here in light of the fact that Sanders had never been asked to make an identification prior to trial. While a distinction might be drawn between a failure to identify a suspect positively and a prior negative response, no such distinction should be drawn here. In addition the evidence on the precise character of the response is uncertain due to the fact that the police officials never recorded the occurrence or its significance.

ture. Certainly this evidence would have provided a fruitful means of exploiting Virgle Sanders' testimony by arguing that Watts, not Moore, was the man who admitted the crime. In addition, the photograph would have been of value in cross-examination of both the State's eyewitnesses. Even though it is not possible on this record to determine whether they would have altered their testimony, the high valne and favorable implications which are suggested by this evidence should be sufficient to require disclosure.[24]

3) The Prosecution Did Not Satisfy its Duty to Disclose this Evidence.

The Illinois Supreme Court also indicated that the disclosure requirements of *Brady* were satisfied because the "prosecutor showed his entire file to the defense attorney." 42 Ill.2d 73, 80.

The record of the trial and post-conviction hearing does not, however, provide substantial support for that finding. The Illinois Supreme Court relied upon the declaration of the State's brief on appeal referring to the testimony given at the post-conviction hearing by the assistant State's Attorney, Mr. Fleming. (PCR. 201-202.)

The delivery of the file was, however, flatly denied by defense attorney Horka to whom it was assertedly given. (PCR. 230-235.) The trial record supports the testimony of defense counsel that the contents of the file were not disclosed. Prior to trial, the prosecutor expressed opposition to disclosure other than the names of witnesses, and written statements of witnesses to be given at the close of direct testimony. (TR. 31-32, 41.) Early in trial, defense counsel requested certain statements taken by

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[24] Cf. *Ashley* v. *Texas*, 319 F.2d 80 (5th Cir. 1963).

police officer Kippitz the night of the murder. (TR. 464.) The prosecuting attorney futilely objected that these were not among the statements agreed upon before trial and were not admissible; thereupon, the following colloquy took place:

The Court: He is asking for statements that he took from witnesses.

Mr. Fleming: You want us to give him those?

The Court: Yes.

Mr. Fleming: Give him the whole file.

Mr. Horka: I object to Mr. Fleming's dramatics.

The Court: Give him any statements he made. You are in possession of statements and he is just asking for the statements that he made.

Mr. Fleming: No, you misunderstand. That's my whole purpose. I would like to be heard on this because he is asking for all statements of all the witnesses, of the statements that he took.

The Court: What are you asking for Mr. Horka?

Mr. Horka: I am asking for anything that he wrote down at the time and place, at the scene.

The Court: When?

Mr. Horka: On April 25, 1962 or immediately thereafter.

The Court: In the tavern?

Mr. Horka: In the tavern or—

The Court: Or before he went to the tavern?

Mr. Horka: No, in the tavern immediately thereafter.

The Court: You may have them.

Mr. Mack: All right, Judge, at this time the State is furnishing to defense counsel a statement that this officer was present at and took from Mrs. Lorena Cooper, from Mr. Charles Davis, from Mr. Charles Mayer, from Mr. Henley Powell and from Mr. Donald O'Brien.

The Court: All right. Now he has them.

Mr. Fleming: Of course, Judge what is he going to do with them?

The Court: I don't know.

Mr. Fleming: He can't impeach this officer with them. (TR. 465-466.)

At this time, the prosecutor clearly had not revealed his entire file to the defense. Moreover, the colloquy indicates that he had no intention of doing so without a direction from the Court. The trial record contains no other affirmative indication that the prosecutor revealed any of the contents of his file with the exception of his delivery of the extrajudicial statements of the State's eyewitnesses, Patricia Hill and Henley Powell. The only other reference to that file contained in the trial transcript is the prosecutor's assertion during his closing argument that he had shown the defense his file. (TR. 951.)

Finally, a conclusion that the file was delivered to the defense cannot discharge the prosecution's duty where the evidence is not contained in the file. Thus, at a minimum, the negative identification made by William Leon Thompson and the oral comment of Virgle Sanders remained suppressed. Moreover, even assuming the prosecution's file to have been shown to the defense during trial, the circumstances under which it could be viewed might not permit a reasonable scrutiny by counsel to ascertain favorable information.

II

WHERE THE DECEASED WAS KILLED WITH A TWELVE-GAUGE SHOTGUN, THE INTRODUCTION AND USE OF A SIXTEEN-GAUGE SHOTGUN, TOTALLY UNCONNECTED WITH PETITIONER OR THE CRIME CHARGED, DENIED PETITIONER A FAIR TRIAL AND DUE PROCESS OF LAW.

As admitted in the prosecution's response to a motion for a bill of particulars (A. 2), the deceased was killed

with a twelve-gauge shotgun. The prosecution apparently had in its possession a report from the Chicago Police Scientific Crime Detection Laboratory indicating the gauge of the wadding taken from the deceased's body, but the report was not in the prosecution's file and was not introduced at trial (A. 130-138). At the close of petitioner's case, there was a stipulation that if the officer who made the report were called, he would testify that in his opinion the waddings came from a twelve-gauge shotgun shell (A. 139).

Nonetheless, the prosecution introduced into evidence over defense counsel's repeated objections (A. 81-93) a sixteen-gauge sawed-off shotgun taken from the back seat of a car belonging to petitioner's friend, on the occasion of petitioner's arrest some six months after the crime charged as he and his friend sought to enter the car (A. 57-61, 66-71, 74-80). The sawed-off barrel was subsequently recovered from beneath a bed in the friend's home (A. 77).

A. Prosecution Use of the Sixteen-Gauge Shotgun Inflamed the Jury and Denied Petitioner a Fair Trial and Due Process of Law.

Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. *Spencer* v. *Texas*, 385 U.S. 554, 563, 87 S. Ct. 648 (1966). In *Spencer*, this Court rejected a claim that inclusion of a defendant's prior convictions in an indictment read to the jury violated the defendant's right to due process of law; the valid state purpose of enforcing the habitual-offender act justified the use of what could be considered prejudicial information. 385 U.S. at 563. In the instant case the state had absolutely no legitimate interest to achieve which

could offset the highly prejudicial effect of the continued display of the irrelevant sixteen-gauge shotgun to the jury.

In *United States* v. *Harris*, 331 F.2d 185 (4th Cir. 1964), the Court stated:

> It is inconsistent with our traditional conception of a fair trial to permit the introduction of any evidence which might influence a jury to convict a defendant for any reason other than that he is guilty of the offense charged. 331 F.2d at 187.

There the court reversed a conviction for possession of nontaxpaid whiskey because evidence had been admitted which described the defendant as having a "record and reputation as a liquor law violator on a large scale."

In *Boyd* v. *United States*, 142 U.S. 450, 12 S. Ct. 292 (1892), this Court reversed a murder conviction under which the defendants had been sentenced to death because evidence of the defendants' participation in other crimes had been admitted.

> [Such evidence] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. * * * However depraved in character, and however full of crime their past lives have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged. 12 S. Ct. at 295.

Lyman Moore was entitled to no less.

The prosecution was less than completely honest when it introduced the shotgun into evidence. Despite its ad-

mission in the Bill of Particulars that the murder weapon was a twelve-gauge shotgun (A. 2) and despite the apparent possession of a laboratory report that the murder weapon was a twelve-gauge shotgun (A. 130-138), the prosecution still allowed and even contributed to the trial judge's mistaken impression that the sixteen-gauge shotgun could have been the murder weapon (A. 90-92).

Having successfully gotten the shotgun admitted into evidence, the prosecution made devastating use of it in securing a guilty verdict and death sentence for petitioner, as these excerpts from the prosecution's closing argument demonstrate:

> Mr. Fleming: Now, he stated to you about the most important witness in this case is this shotgun. And he said this shotgun was found again in a car that was not owned by this defendant. But it was a car that this defendant — and again this man with the mustache were arrested getting in the automobile.
>
> They say this is a 16, which it is, it is a 16. And we stipulated that the pellets, if the expert would have testified that in his opinion they would have been from a twelve-gauge shotgun. He said because this is a 16 and because the pellets came from a twelve-gauge shotgun, really this is the most important thing in this case.
>
> We never contended and we don't now, and the evidence doesn't show it, that this is the shotgun that killed Bernard Zitek. He said, well, this is the thing and the reason why you should go back and find this man not guilty.
>
> Lyman Moore, I submit to you, is that type of defendant that knows when he shoots a bartender and kills that bartender, about the only way for him to get out of it is to toss the shotgun, he shot the bartender with in a creek, bury it, burn it or something else, because he knows if he ever gets caught with that shotgun he is absolutely a goner.
>
> • • •

> And take a look at those, folks, these are in evidence so you can look at them. You see this shell here, it has a ballbearing at the end of it. I wonder what they were going hunting for with this? Pheasants? You shoot deer with this in Wisconsin and Michigan. The other three are goose shot, number 4's. You shoot geese in Canada with that, you don't hunt pheasants in Illinois or target practice with these things, you kill things with this. There is a ballbearing at the end of this, and that is what was in this weapon when it was found in the car as Lyman Moore and this other man went to get into it. (A. 199-201).
>
> * * *
>
> Is the death penalty the type of penalty that is appropriate for shotguns loaded with ballbearings? Is the death penalty appropriate in this type of case where a weapon such as this, not a pistol, not a revolver, an automatic or a rifle, not a club was used but a hard, cold shotgun that shoots a slug about the size of this. Is this the type of case?" (A. 206).

The danger of prejudice in the use of physical but irrelevant evidence has long been recognized.

> Darling, *Scintillae Juris* 58 (1877): What is called 'real evidence' — mostly bullets, bad florins, and old boots — is of much value for securing attention. This is true even when these exhibits prove nothing, — as is generally the case. They look so solid and important that they give stability to the rest of the story. The mind in doubt ever turns to tangible objects. They who first carved for themselves a Jupiter from a log of wood knew very well that the idol could do nothing for them; but it enabled them easily to realize a power who could. A rusty knife is now to any English juryman just what a 'scarabaeus' was to an Egyptian of old. I have seen a crooked nail and a broken charity-box treated with all the

> reverence due to relics of the holiest martyrs [quoted in 4 Wigmore, Evidence § 1157 (3d ed. 140)].

The shotgun should never have been admitted into evidence; petitioner was denied a fair trial and due process of law because of it.

B. A Reversal of Petitioner's Conviction Would Not Involve This Court in Establishing Rules of Criminal Procedure for the State of Illinois.

In *Spencer* v. *State of Texas, supra,* this Court expressed reluctance at becoming established as a rulemaking organ for the promulgation of state rules of criminal procedure; "none of the specific provisions of the Constitution ordains this Court with such authority." Where reliance is placed upon general principles of "fairness", "the Court has always moved with caution before striking down state procedures". 385 U.S. at 563-565.

There is no such impediment to reversing petitioner's conviction in the instant case. There is no Illinois procedure which need be struck down. The Illinois rule on admission of weapons into evidence is clear—and constitutional:

> [A] weapon may be admitted in evidence where there is proof to connect it with the defendant and with the crime. However, it is not necessary to establish that the particular weapon was the one which was actually used. Where the proper connection is established and it is shown that the defendant possessed a weapon which could have been used in the commission of the crime, it may be admitted in evidence. *People* v. *Johnson,* 35 Ill.2d 516, 221 N.E.2d 497, 498 (1966).

In the present case neither did petitioner have possession of the gun (it was recovered from the back seat of

the friend's car and the sawed-off barrel was found at the friend's home), nor could the gun have been used as the murder weapon (the gun was sixteen-gauge and the murder weapon twelve-gauge).

The Illinois rule is elsewhere stated as being that the weapon may be admissible to show that the accused possessed a weapon suitable for the commission of the crime charged against him, even though no claim is made the accused actually used that weapon in committing the particular crime. *People v. Smith,* 413 Ill. 218, 108 N.E.2d 596, 597 (1952). In *Smith,* two sawed-off shotguns were held inadmissible, even though found in the trunk of the car defendants were driving when arrested, because the evidence disclosed the victim had been murdered with a certain caliber pistol; sawed-off shotguns were no more suitable for the commission of that crime than would have been an axe or a pistol of a different caliber.

In affirming petitioner's conviction, the Illinois Supreme Court dealt summarily with the admission of the shotgun:

> There is no clear evidence of the weapon actually used in this homicide, although it is clear that it was a shotgun. We have consistently held that a weapon found upon a defendant suitable for the commission of the crime charged is proper evidence even though there is no showing that it was the actual weapon used. 42 Ill.2d 73, 246 N.E.2d 299, 303 (1969).

Justice Schaefer, dissenting in the instant case, was unconvinced:

> In the cases cited by the majority no ballistic evidence was available, and therefore the suitability of the weapon for the commission of the crime charged could be established only by a physical description.

> In this case, however, the prosecution had ballistic test results in its possession throughout the trial which showed that Zitek was shot with a twelve-gauge shotgun. The shotgun received in evidence was thus as unsuitable for the commission of this murder as was the excluded .38 caliber revolver. 246 N.E.2d at 307.

The admission of the shotgun into evidence denied petitioner a fair trial and due precess of law; the Illinois rule regarding admission of weapons, if properly applied, does not. Hence, reversing petitioner's conviction does not mean that this Court need establish a new rule of criminal procedure for the State of Illinois.

C. Since Both Petitioner's Guilt and Punishment Were Determined in the Same Jury Proceeding, He Was Denied a Fair Trial and Due Process by the Prosecution's Use of Evidence Totally Unconnected with the Issue of his Guilt.

The Illinois legislature has authorized the jury to determine both guilt and punishment in capital cases. Ill. Rev. Stat., Ch. 38, § 1-7 (1969). The jury did so in the present case, fixing the penalty at death (A. 218). There is a special danger in admitting irrelevant and inflammatory evidence when the jury is faced with such awesome responsibility.

We do not propose another assault on the unitary trial system held constitutional in *Spencer* v. *Texas, supra,* and *McGautha* v. *California,* ..... U.S. ....., 91 S. Ct. ....., 28 L.Ed.2d 711 [1971]; issuance of mandate stayed pending disposition of the petitions for rehearing (6/28/71). What we do propose is that the prosecution be limited in the evidence it may introduce in unitary proceedings to evidence tending to establish the defendant's guilt.

The injustice inflicted upon petitioner in the instant case is obvious. There is absolutely no evidence linking the sixteen-gauge shotgun to the crime charged. The only thread tying petitioner to the gun is his approach to a friend's car from which the gun was taken. And the jury, with that sixteen-gauge shotgun staring them in the face, determined that petitioner must die. If such practice can be held to comport with the requirements of due process, then to paraphrase remarks attributed to petitioner by witnesses at his trial, it will be open season on defendants.

In *Spencer* v. *Texas, supra,* potentially prejudicial information was allowed to go to the jury, even though the jury could sentence the defendant to death, because it was felt that the state had a valid countervailing purpose in the enforcement of its recidivist statutes. 385 U.S. at 560-563. What could the prosecution's countervailing purpose possibly be in the present case? To argue that petitioner must die because he is a bad man is hardly worthy of the State of Illinois.

The Illinois Supreme Court has reversed a conviction and death sentence imposed by a jury, despite overwhelming evidence that the defendants had committed the crime charged. *People* v. *Smith, supra.* "A man is not to be convicted of a crime merely because he is a bad man generally or has committed other crimes for which he has not been punished." 108 N.E.2d at 598. Two sawed-off shotguns having nothing whatever to do with the crime charged in the indictment were admitted into evidence.

> Such an array of weapons could only serve to arouse the jury and prejudice the defendant's position. * * * The effect of all this incompetent evidence was to close the mind of the jury to any considera-

> tion of mercy or leniency. * * * A verdict finding him guilty of murder and setting death as his punishment cannot be sustained even if the competent evidence was so complete there could be no other verdict than guilty, where there is any incompetent evidence having a tendency to influence the jury in fixing the degree of punishment.

Petitioner was denied a fair trial and due process of law when the prosecution used the irrelevant sixteen-gauge shotgun to secure his death sentence.

III

THE DECISIONS OF THIS COURT IN WITHERSPOON v. ILLINOIS AND ITS PROGENY REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE.

Witherspoon v. *Illinois*, 391 U.S. 510, unequivocally held that a state may not impose capital punishment where prospective jurors were excused solely on the ground that they expressed conscientious scruples against the death penalty. Subsequent decisions of the Court have consistently reemphasized that

> "it cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' * * * thereby affirms that he could never vote in favor of it or that he could not consider doing so in the case before him.
>
> The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood — or misunderstood — by prospective jurors. * * * Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position."

Witherspoon v. *Illinois*, 391 U.S. at pp. 515-516, n. 9; see also *Boulden* v. *Holman*, 394 U.S. 478, 481-484; *Maxwell* v. *Bishop*, 398 U.S. 262, 264-266. The record of the *voir dire* examination conducted in this case reveals that eight of 48 veniremen were removed for voicing precisely the same general reservations as were expressly condemned in *Witherspoon*.[25]

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[25] Compare 391 U.S. at p. 515 with Tr. 122, 151-152.

ESTHER BYRNE, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. Well, ordinarily enough, I take the same stand as Mr. Byrne. I don't believe in capital punishment.

Q. In other words, even if we have a law in this State to that effect, you wouldn't believe in it, anyway?

A. No, I don't, definitely not.

The Court: Very well. That's your prerogative. You're excused for cause.

LOUIS LORENS, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. I do not believe in capital punishment.

The Court: Well, step down.

(Prospective juror excused.)

KATHERINE KRISTOCK, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. I'm afraid I do. I don't believe in capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

[25] (continued)

MARIAN PETERSON, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction o fthe death penalty in a proper case?

A. Yes, I have very strong convictions against capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

NEBRASKA PETTY, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of a death penalty in a proper case?

A. I do.

The Court: Step down.

(Prospective juror excused.)

JACQUELINE B. THREATT, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. You do? What do you mean?

A. I don't believe in capital punishment.

Q. Say that again.

A. I feel very strongly against capital punishment.

The Court: Step down, please. Call another juror.

[25] (continued)

MARY GORSKI, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do, your Honor.

The Court: All right, step down.

ANNA L. HOHNWALD, prospective juror:

Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. Step down, please.

This Court has also rejected the justifications offered by the State of Illinois in support of defendant's death sentence. In *Illinois* v. *Speck*, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968), *Illinois* v. *Bernette*, 45 Ill. 2d 227, 258 N.E. 2d 793 (1970), and *Illinois* v. *Tajra*, 45 Ill. 2d 227, 258 N.E. 2d 793 (1970), as in the present controversy, the State Supreme Court improperly attempted to excuse the exclusion of veniremen merely for the expression of scruples against the death penalty on the grounds that the total circumstances and tenor of the *voir dire* examination differed from that condemned by *Witherspoon*, and that any erroneous removal of eligible jurors was rendered harmless by the prosecution's possession of peremptory

challenges. The summary reversal of the death sentence in those, and other cases,[26] calls for like treatment here.[27]

CONCLUSION

For the reasons set forth herein, the conviction of petitioner should be reversed or, at the very least, the death sentence should be set aside.

Respectfully submitted,

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[26] *Speck* v. *Illinois*, ... U.S. .....; *Bernette* v. *Illinois*, ... U.S. .....; *Tajra* v. *Illinois*, ... U.S. .....; see also *Mathis* v. *Alabama*, ... U.S. .....; *Sequra* v. *Patterson*, ... U.S. .....; *Whan* v. *Texas*, ... U.S. .....; *Dupless* v. *Louisiana*, ... U.S. .....; *Jaggers* v. *Kentucky*, ... U.S. .....; *Aiken* v. *Washington*, ... U.S. .....; *Wheat* v. *Washington*, ... U.S. .....; *Pruett* v. *Ohio*, ... U.S. .....; *Quintana* v. *Texas*, ... U.S. .....; *Wigglesworth* v. *Ohio*, ... U.S. .....; *Crain* v. *Beto*, ... U.S. .....; *Wilson* v. *Florida*, ... U.S. .....; *Pemberton* v. *Ohio*, ... U.S. .....; *Ladetto* v. *Massachusetts*, ... U.S. .....; *Turner* v. *Texas*, ... U.S. .....; *Harris* v. *Texas*, ... U.S. .....; cf. *Adams* v. *Washington*, ... U.S. .....; *Funicello* v. *New Jersey*, ... U.S. .....; *Childs* v. *North Carolina*, ... U.S. .....

[27] In light of this Court's rulings in *Speck* and its companion cases, the State may not argue that the existence of remaining peremptory challenges sufficient to eliminate the eight jurors supports the imposition of the death penalty by a jury otherwise in violation of the Constitution. In any event, the Illinois Supreme Court was factually incorrect since only three peremptory challenges were unused, a number clearly insufficient to remove all improperly excused veniremen.